SUPREME COURT, U. S.

In the Supreme Court

of the United States

OCTOBER, 1966 TERM

No. 1,000

PACIFIC INLAND NAVIGATION COMPANY, a corporation,

Petitioner,

v.

DELBERT A. COURSE,

Respondent.

MOTION OF COLUMBIA RIVER TOWBOAT ASSOCIATION FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE FOR GRANTING A WRIT OF CERTIORARI

(With proposed brief appended thereto)

THOMAS J. WHITE,
WILLIAM F. WHITE,
WHITE, SUTHERLAND & GILBERTSON,
1200 Jackson Tower, Portland, Oregon,
Counsel for Moving Party,
Columbia River Towboat Association.

STEVENS-NESS LAW PUB. CO., PORTLAND, ORE. 1-67

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Comes now Columbia River Towboat Association and moves this Court for an order granting leave to file a brief amicus curiae on question of whether the petition for certiorari should be granted. Columbia River Towboat Association appeared as amicus curiae with consent of both parties in the Court below (368 F.2d 540). Now, only respondent refuses to consent to the appearance. The proposed brief is appended to this motion.

It is the position of Columbia River Towboat Association that this Court should grant certiorari and review the decision of the Court of Appeals for the Ninth Circuit which misconstrued this Court's holding in *Reed* v. *The Yaka*, 373 U.S. 410 (1963) and in so doing sanctioned a direct *in personam* action by a harbor worker against his employer for injuries received as a result of the unseaworthiness of his employer's tugboat. Section 5 of the Longshoremen's and Harbor Workers' Compensation Act clearly bars such an action.[1]

Your Petitioner's Interest

For many years the fourteen members of the Columbia River Towboat Association[2] have been engaged in towing and transporting cargoes on the Columbia and Willamette Rivers. Each operator, whether large or small, employ shop repairmen, welders and electricians precisely as did Pacific Inland

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[1] 33 U.S.C. No. 905: "The liability of an employer prescribed in Section 904 of this title shall be exclusive and in place of all other liability of such employer to the employee, . . . otherwise entitled to recover damages from such employer at law or in admiralty on account of such injury or death. . . ."

[2] Atlas Tug Service, Longview, Washington; Brusco Towboat Co., Cathlamet, Washington; Columbia Pacific Towing Corporation, Stevenson, Washington; Diesel Towing Co., Portland, Oregon; Knappton Towboat Co., Portland, Ore.; The Mirene Co., Portland, Ore.; Pacific Inland Navigation Co., Vancouver, Wn.; Ramona Towboat Co., Inc., Portland, Ore.; Shaver Transportation Co., Portland, Ore.; Shepard Towing Co., St. Helens, Ore.; Smith Tug & Barge Co., Rainier, Ore.; Tidewater Barge Lines, Inc., Portland, Ore.; Western Transportation Co., Portland, Ore.; Willamette Tug & Barge Co., Portland, Oregon.

Navigation Co. employ Delbert Course. These employees are employed regularly on a year around basis. They work primarily ashore but as occasion requires they board their employer's tugs and barges to repair, maintain or overhaul them. None are members of a crew and none do longshoremen's work or are employed through a hiring hall for specific jobs as are longshoremen. These tugboat operators, as employers, have long carried insurance as required by the Longshoremen's Act (as well as State compensation insurance as required for on-shore accidents) in order to fully afford these employees full protection even though they, at best, only work spasmodically upon navigable waters. The only consideration for giving these employees expensive compensation for injuries on a non-fault basis has been the assurance of Congress in Section 5 of the Act that these employees could not also sue their employer in law or in admiralty.

While petitioner can only speak for its own members, one can well imagine that tugboat operators on the Pacific and Atlantic Coasts as well as the Great Lakes and the great Western Rivers (Mississippi and Ohio Rivers) find themselves in the same plight as members of the Columbia River Towboat Association.

WILLIAM F. WHITE
WHITE, SUTHERLAND & GILBERTSON
1200 Jackson Tower
Portland, Oregon
Counsel for Columbia River
Towboat Association

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REASONS FOR GRANTING A WRIT

"Give us the grain, and throw away the straw."[3]

This Court's opinion in *Reed* v. *The Yaka*, 373 U.S. 410 (1963) is equivocal in respect to its language and its actual holding. That case came to this Court as

[3] Justice Story: Life and Letters, II, 89-90.

an *in rem* action by longshoreman Reed against the *YAKA* as claimed by her owner, Waterman Steamship Co. In turn Waterman impleaded Pan-Atlantic as a third party respondent *in personam* claiming that Pan-Atlantic as the bareboat charterer of the YAKA had breached its agreement to indemnify and save Waterman harmless from a claim such as was being asserted by longshoreman Reed. At no time did Reed assert a direct claim of any kind against his employer, Pan-Atlantic. The case was the typical "maritime triangle" as sanctioned by this Court in *Ryan Stevedoring Co.* v. *Pan-Atlantic SS Co.*, 350 U.S. 124 (1956).

As we read *The Yaka* this Court was not called upon and did not hold that an *in personam* action could be brought by an injured longshoreman against his employer who was also a vessel owner. The Court of Appeals of Louisiana for the Fourth Circuit twice read *The Yaka* just as we do. *Robinson* v. *Lykes Bros. SS. Co.*, 170 So. 2d 243 (1965); *Helen Jackson* v. *Lykes Bros. S.S. Co.*, 185 So. 2d 342 (1966).

Considering that Article III of the Constitution limits this Court's jurisdiction to the deciding of justiciable controversies,[4] the only holding which this Court could have constitutionally made within the issues as framed and argued[5] is found in the last sentence of this Court's opinion reading:

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[4] Muskrat v. United States, 219 U.S. 346, 357 (1910).

[5] 373 U.S. Dissent in The Yaka by Mr. Justice Harlan joined in by Mr. Justice Stewart: ". . . Under a statute which was specifically written to include shipowners who employed their own dockworkers, and which excluded liability at law

> "We conclude that petitioner was not barred by Longshoremen's Act from relying on Pan-Atlantic's liability as a shipowner for the *Yaka's* unseaworthiness in order to support his libel *in rem* against the vessel."

The above holding does not judicially repeal Section 5 of the Longshoremen's Act nor does it sanction the direct action in admiralty by employee against employer as maintained in the Courts below.

Yet, the Court of Appeals by quoting language from *The Yaka* decision finds that this Court in the clearest of terms held that Section 5 of the Act (33 U.S.C. § 905) did not bar recovery by an employee for a breach of his employer's warranty of seaworthiness in a direct *in personam* action in admiralty against his employer.

So much has been left unsaid in this Court's *Yaka* opinion and so much consternation, hardship and injustice has accumulated in the shipping world as a result that a writ should be granted to clear the air so that both Congress and the shipping industry can know explicitly where they stand in respect to the compensation scheme that has long existed under the Longshoremen's Act.

Did this Court intend to repeal or nullify Section 5 of the Act? In spite of its constitutional inability

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or *in admiralty*, there is no room for concluding that an employer shipowner can be held liable to his own longshoreman employee for unseaworthiness. Indeed, the point was so clear that petitioner has had what I would have thought was the good sense not even to argue to the contrary. (He has instead based his argument wholly on the theory that the ship itself may be liable even in the absence of any underlying personal liability on the part of anyone)."

to have done so, Mr. Justice Harlan joined in by Mr. Justice Stewart in the dissenting opinion thinks so. Even in the Court of Appeals below, Senior District Judge Mathes thinks so. He concurred specially by stating:

> "I concur in the result; but do so only because *Reed* v. *SS YAKA*, 373 U.S. 410 (1963), as I understand it, *ex necessitate* reads #5 out of the Longshoremen's and Harbor Workers Compensation Act (33 U.S.C. § 905), as applied to the case at bar."

Likewise, the Court of Appeals for the Fourth Circuit thinks so, *Biggs* v. *Norfolk Dredging Co.*, 360 F.2d 360 (1966).

All this has come about in spite of this Court's earlier interpretations and applications of Section 5 of the Act as in *Swanson* v. *Marra Bros.*, 328 U.S. 1 (1946) and *Pennsylvania Railroad* v. *O'Rourke*, 344 U.S. 334 (1953) and lower court holdings in *Smith* v. *Mormacdale*, 198 F.2d 849 (3 Cir., 1952) and *Samuels* v. *Munson SS Co.*, 63 F.2d 861 (5 Cir., 1953).

More important, the Court of Appeals reading of *The Yaka* cannot on principal square with this Court's most recent holding in *United States* v. *Demko*, — U.S. —, 17 L. Ed. 2d 258 (Dec. 5, 1966).

This Court has long demonstrated a passionate desire to protect longshoremen. Perhaps a more appealing reason for granting a writ in this case is found in the 1959 amendment which Congress made

to Section 33a (33 U.S.C. § 933) of the Longshoremen's Act where, among other things, it added a new sub-section "(i)."[6] This new sub-section had as its unmistakable purpose the immunization of fellow employees of an injured harbor worker from direct actions at law or in admiralty identically with the same immunity given the employer under Section 5 of the Act.[7] This 1959 amendment was apparently overlooked by the Court when it decided *The Yaka* as the Court observed a lack of Congressional reaction to its recent decisions in this field of law.[8] If any consistency at all is to be accorded the Longshoremen's Act, both Section 5 and sub-section "(i)" of Section 33 of the Act must stand or fall together. Unless a writ is granted and the case below reversed we will have the anomalous situation of Congress in 1959 placing fellow employees of the "employee family" under the umbrella of immunity only to have this Court four years later shoving the employer, who is the head of

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[6] 33 U.S.C. § 933 as amended August 18, 1959, Pu. L. 86-171, 73 Stat. 391, which added: "(i) The right to compensation or benefits under this chapter shall be the exclusive remedy to an employee when he is injured, or to his eligible survivors or legal representatives if he is killed, by the negligence or wrong of any other person or persons in the same employ. *Provided*, that this provision shall not affect the liability of a person other than an officer or employee of the employer."

[7] *Bynum* v. *The Mormacteal*, 188 F. Supp. 763 (E. D. Pa., 1960); *Garland* v. *Alaska Steamship Co.*, 217 F. Supp. 757 (D. Ct., Alaska, 1963); *Report of Secretary of Labor to the Senate on H. R.* 451, U. S. Code, Congressional and Administrative News, 1959 at page 2134.

[8] From Court's opinion in *Reed* v. *The Yaka* (1963) 373 U.S. 410 at 414, ". . . We must view it in the light of our prior cases in this area, like Sieracki, Ryan, and others, the holdings of which have been left unchanged by Congress...."

the "employee family" out into the rain. Even for the sake of the "adopted wards" of admiralty a writ should be granted.

By this Court permitting the Court of Appeals to infer from *The Yaka* the reading of Section 5 out of the Longshoremen's Act is to create and compound the very harsh and incongruous effects upon the shipping community which this Court sought to avoid. Here are some of them:

1. The once equitable idea of an employer compensating his employees for on-job injuries irrespective of fault on a compensation basis in consideration of being protected against direct court actions at law or in admiralty by such employees has gone out the window.

2. Right now employers who carry what they had believed gave them full protection now find that they are exposed to unlimited liability because of the hiatus created by the Court below. This is because the standard insurance policy required by the Longshoremen's Act covers harbor workers only to the limit of compensation payments. In the case below, the harbor worker was already paid his compensation benefits before he sued and secured the $12,566.08 judgment against his employer. The standard public liability policy of the employer (stevedore or tugboat operator) usually covers all liabilities except for actions brought by "employees who are not members of a crew." We are aware of at least one case where both of the afore-mentioned insurance underwriters are

seeking declaratory relief; each claiming the liability belongs to the other.

3. The employer of the harbor worker who now finds the Longshoremen's Act nothing but an expensive snare and delusion cannot give up his insurance and get out of the trap. If he fails to keep up such insurance he can be fined and thrown into jail (33 U.S.C. 938).

4. The shipping industry must have reasonable certainty of its exposure to liability for injury to its workers. The case below and others which have stemmed from this Court's decision in *The Yaka* have created nothing but confusion and consternation in this industry which is so vital to the prosperity and well being of our nation.

So little is required and so much is to be gained by granting a writ and restore rhyme and reason to this presently confusing situation that your petitioners pray that this Court in its wisdom grant the writ as prayed for by Pacific Inland Navigation Company.

Respectfully submitted,

WILLIAM F. WHITE
WHITE, SUTHERLAND & GILBERTSON
1200 Jackson Tower
Portland, Oregon

CERTIFICATE OF SERVICE

Petitioner consents to motion of Columbia Towboat Association to appear amicus curiae and acknowledges receipt of copies of motion and proposed brief.

Dated: at Portland, Oregon this ..... day of February, 1967.

Of Counsel for Petitioner

Respondent does not consent to motion of Columbia Towboat Association to appear amicus curiae but does acknowledge receipt of copies of motion and proposed brief.

Of Counsel for Respondent